No. 88-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF PETITIONER EAGLE-PICHER INDUSTRIES, INC., TO OPPOSITION OF UNITED STATES

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The United States opposes Eagle-Picher's petition for certiorari on the grounds that (i) although the Third Circuit's *ratio decidendi* may be in conflict with prior decisions of the Fifth and Ninth Circuits, its outcome on the narrow facts of this case does not create an inter-circuit conflict; and (ii) the Third Circuit's "alternative" ground of decision—asserted solely in one footnote[1] to its opinion—would cause no inter-

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[1] Pet. App. 11a, fn. 8: "Nevertheless we agree that our decision could have been based on the more indirect rationale

circuit conflicts to arise and is sufficient to sustain its decision. The government does not, however, minimize the importance of the decision or of the federal questions presented.

ARGUMENT

Eagle-Picher submits that the case for grant of certiorari is compelling notwithstanding the government's arguments. The Third Circuit's principal underlying rationale for its decision is indefensible, and, if allowed to stand, will distort the law relating to federal maritime workers' rights for decades to come. Contrary to the government's arguments, the lower court's opinion *does* conflict[2] with the holdings of the Ninth Circuit in *Normile*[3] and the Fifth Circuit in *Aparicio*.[4]

1. In those cases, both the Ninth and the Fifth Circuits held that federally employed maritime workers retain valid rights of action for injuries caused

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advocated by the government." That rationale is that the government's absolute immunity to suit by one of its own employees under Section 8116(c) of the FECA is a relevant "circumstance" in determining the liability under the FTCA of the analogous "private individual under like circumstances." *See* p. 7, *infra*.

[2] Although the outcome in this case—denial of a third party's right to contribution for injuries to a federally-employed maritime worker—does not directly conflict with the outcomes of those decisions, that is only because the Fifth and Ninth Circuit decisions involved direct claims, not third-party claims for contribution and indemnity. But the basis for the lower court's holding, and the only reasoned justification for that outcome—that a federal employee would not have a right of action against a negligent vessel owner—does conflict.

[3] *Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380 (9th Cir. 1981).

[4] *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981).

by vessel owners regardless of the fact that they are exempted from the Longshore and Harbor Workers Compensation Act ("LHWCA") for *compensation* purposes. By contrast, the Third Circuit in this case relied *solely* on the exclusion by Section 903(b) of the LHWCA of federal workers from LHWCA coverage to support its conclusion that Eagle-Picher could not state a valid third-party claim for contribution and indemnity. Pet. App. 15a. The Court reasoned that, if the underlying injured worker did not have a valid cause of action against a vessel-owner, then Eagle-Picher could not have a valid third-party action either, because the underlying substantive law (according to the court, the law of Pennsylvania) did not allow third-party recovery in the absence of common liability.

The lower court found that Eagle-Picher did not state a valid third-party claim only because it concluded that Mr. Press could not have stated a valid direct claim. And it found Mr. Press disabled from stating a direct claim *not* because of Section 8116(c) of FECA, but because he was excluded from coverage by the LHWCA.[5] The Third Circuit's *ratio decidendi*

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[5] Eagle-Picher submits that a proper analysis does not require any reference to a *federal* employee's peculiar rights or liabilities under the LHWCA or any other statute. The FTCA requires that the government's liability for third-party tort claims be measured by reference to that of a "private individual under like circumstances"—that is, a private shipyard employer who would be subject to suit for vessel-owner negligence even by one of his own employees under *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

Contrary to the government's argument that the need for *certiorari* is diminished because Section 905(b) has been amended prospectively to eliminate "dual-capacity" suits, the need for

did not in any way depend on the status of the United States as the employer of the maritime worker or as the owner of the vessel on which he worked and where he was injured. Contrary to the government's characterization, the § 903(b) exclusion applies equally to federal employees whether they are injured by a United States-owned vessel or a privately-owned vessel. The logic of the Third Circuit's opinion depends entirely on the mistaken conclusion—in conflict with the holdings of the Fifth and Ninth Circuits—that a federal employee, because exempted from LHWCA coverage by § 903(b), is disabled from bringing a cause of action against any negligent vessel owner, regardless of the status of that vessel owner.

In its Opposition, the government speculates that "it may be that the Court below would conclude that federal longshore and harbor workers may pursue either a common-law negligence action or an unseaworthiness action against private vessels. . . ." Gov't Opp. at 10, n.12. However, if Mr. Press *could* have pursued either such action against a private vessel-owner, then Eagle-Picher would *not* be disabled from pursuing a third-party action against the government under the FTCA, because the FTCA requires that the government be held liable for tort claims to the same extent as a "private individual under like circumstances," and a private individual under like circumstances would be subject to third-party liability. Thus, if the Court below were to conclude as the govern-

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certiorari remains acute because the underlying question—the proper interpretation and application of the FTCA to third-party suit where the government enjoys a unique immunity to direct suit—is unresolved.

ment speculates, then it would have to reverse its holding denying Eagle-Picher's third-party claim.

2. The government's brief in opposition confuses the issues presented here by arguing that three courts of appeals are united in disallowing third-party claims against the government where the underlying injured party is a federal maritime employee. All three decisions—in contrast to the four consistent and logically concordant district court decisions cited by Eagle-Picher in its certiorari petition at 12—are in disagreement as to the putative basis for denying such claims. Although the Federal Circuit has recently denied a similar third-party cause of action (in a decision issued after Eagle-Picher's petition for certiorari was filed), *see Lopez v. A.C.& S, Inc.*, 858 F.2d 712 (Fed. Cir. 1988), it never even cited the Third Circuit opinion for which certiorari is requested here. Instead, the *Lopez* court apparently relied on a misguided interpretation of the First Circuit's rationale in *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986). That rationale—mistakenly injecting an independent, additional "maritime nexus" requirement into Section 905(b) of the LHWCA—was expressly rejected by the district court in this case, and formed the basis for one of the questions certified for interlocutory appeal, a question that the court of appeals never answered. (Instead, the court went off on the § 903(b) tangent.)

Contrary to the government's argument (Gov't Opp. at 7), moreover, the lower court's holding that admiralty jurisdiction does not exist over a shipyard employee's claim for asbestos-related injuries against a land-based manufacturer—a holding on which all the

courts of appeals that have addressed the issue concur—is not an alternate basis for upholding the denial of Eagle-Picher's third-party claim here. Whether or not admiralty jurisdiction exists over the injured maritime worker's claim for product liability against a land-based manufacturer is irrelevant to the question whether admiralty jurisdiction exists over *Eagle-Picher*'s claim for third-party contribution for negligence of the vessel, a claim determined under the standards of *Scindia Steam Navigation Co. v. DeLos Santos*, 451 U.S. 156 (1981), not under product-liability principles.

The First Circuit's holding in *In re All Maine* has been rejected by two district courts that have subsequently examined it, including the district court in this case,[6] and that decision was left unreviewed by the court of appeals here.

3. Had the government opposed Eagle-Picher's certiorari petition on the ground that, although the Third Circuit was mistaken in its rationale, its decision was nonetheless correct, and therefore not worthy of certiorari, the government's position would at least have been somewhat more understandable. However, the government has argued both that the "reasoning relied upon by the court below . . . is . . . correct" (Gov't. Opp. at 8), and that the footnote reference in the Court's holding to the exclusive-liability provision of the FECA also states a valid basis for its decision. However, to the extent that the gov-

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[6]In addition to District Court Judge Pollak's decision in this case, the decision of Judge Tashima *In re All* [*Hawaii*] *Asbestos Cases*, "Memorandum Order Re Reconsideration and Certification," Nos. 79-0382, *et al.* (D. Hawaii, Dec. 23, 1986), also expressly considered and rejected the First Circuit's rationale.

ernment appears to rely on the Court's footnote reference to Section 8116(c) of the FECA, the decision undeniably raises important federal questions as to the interpretation and interaction of the FECA, the FTCA, and the LHWCA. If the Court's opinion depends on whether the *legal* circumstance (peculiar to the government) of FECA-based immunity to suit by federal employees is a relevant "like circumstance" in analogizing the United States to a "private individual under like circumstances" for purposes of tort liability under the FTCA, it then raises the very important and unsettled question of whether the FTCA requires analogizing the United States to a private individual under like *legal* circumstances or to a private individual under like *factual* circumstances. To the extent that the Third Circuit purported to resolve this issue, it did so in direct conflict with the Ninth Circuit's recent decisions in *Bell Helicopters v. United States*[7] and *LaBarge v. Mariposa County*.[8] Both cases held that a third party's right to contribution in tort from the United States depends on whether an analogous private party, subject to the like *factual* circumstance of coverage under state workers' compensation statutes, would be subject to third-party liability, *not* on whether a nonexistent fictitious entity that shares one and only one *legal* circumstance with the United States—its special immunity under Section 8116(c) of the FECA—would be subject to third-party liability.[9]

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[7] 833 F.2d 1375 (9th Cir. 1987).

[8] 798 F.2d 364 (9th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987).

[9] The government misplaces its reliance on *United Airlines*,

As Eagle-Picher has consistently argued, the issue is whether the United States should be immune from third-party liability even where a private individual in like circumstances—a private shipyard employer/vessel-owner—would *not* be so immune.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert denied*, 379 U.S. 951 (1969), *Wien Alaska Airlines, Inc. v. United States*, 375 F.2d 736 (9th Cir.), *cert. denied* 389 U.S. 940 (1967), and *Adams v. General Dynamics Corp.*, 535 F.2d 489 (9th Cir. 1976), *cert. denied*, 432 U.S. 905 (1977), to attempt to square Ninth Circuit precedent with the lower court's "alternative rationale." None of those cases involved the possibility of tort liability under a dual capacity doctrine, such as the vessel-owner liability affirmed in *Jones & Laughlin*. Thus, the courts in those cases never confronted the issue whether the proper analogous private party under the FTCA was an employer subject to state workers' compensation statutes or a fictitious "private individual" subject to the exclusive liability provision of the FECA. Since, in those cases, even a *private* party would not have been liable for third-party contribution in tort, the question of the proper analogy under the FTCA never arose.